

LAW OFFICES
COHN AND MARKS LLP

DOCKET FILE COPY ORIGINAL

SUITE 300
1920 N STREET N.W.
WASHINGTON, D.C. 20036-1622

ROBERT B. JACOBI
ROY R. RUSSO
RONALD A. SIEGEL
LAWRENCE N. COHN
RICHARD A. HELMICK
J. BRIAN DE BOICE
JEROLD L. JACOBS
JOSEPH M. DI SCIPIO
KEVIN M. GOLDBERG
SUSAN V. SACHS

OF COUNSEL
MARCUS COHN (1913-2001)
LEONARD H. MARKS
JOEL H. LEVY

TELEPHONE (202) 293-3860
FACSIMILE (202) 293-4827
HOMEPAGE WWW.COHNMARKS.COM

DIRECT DIAL: 202/452-4823
EMAIL ADDRESS: jerold.jacobs@cohnmarks.com

August 22, 2005

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
Portals II, Filing Center, TW-A325
Washington, D.C. 20554

RECEIVED

AUG 22 2005

Federal Communications Commission
Office of Secretary

**Re: MM Docket No. 99-25
(Creation of a Low Power Radio Service)**

Dear Ms. Dortch

Enclosed for filing, on behalf of our client, Western North Carolina Public Radio, Inc., are an original and four (4) copies of its "**COMMENTS OF WESTERN NORTH CAROLINA PUBLIC RADIO, INC.**" in the above-referenced matter.

Please direct any communications or correspondence concerning this matter to the undersigned.

Very truly yours


Jerold L. Jacobs

Enc.

No. of Copies rec'd 0 x 4
List A B C D E

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Creation of a Low)
Power Radio Service)
)

MM Docket No. 99-25

RECEIVED

AUG 22 2005

To: The Commission

Federal Communications Commission
Office of Secretary

COMMENTS OF
WESTERN NORTH CAROLINA PUBLIC RADIO, INC.

WESTERN NORTH CAROLINA PUBLIC RADIO, INC. ("WNCPR"), licensee of three full-power noncommercial FM radio stations in western North Carolina,¹ by its attorneys, hereby comments on selected issues raised in the *Second Order on Reconsideration and Further Notice of Proposed Rulemaking*, 20 FCC Rcd 6763 (2005), in the above-captioned proceeding.

I. Ownership and Eligibility

A. Transferability

The Commission seeks comment on permitting changes of more than 50 percent of the membership of governing boards. WNCPR believes that boards of non-profit organizations evolve in a natural manner -- sometimes gradually, sometimes rapidly. WNCPR is a non-profit organization and has experience with board turnover. Whether this turnover is rapid or gradual, as long as the organization's mission and purpose remain the stated purposes in its Articles of Incorporation, board turnover should not be construed as a transfer or assignment of license or authorization or as a change in ownership.

¹ WCQS(FM), Asheville North Carolina; WFQS(FM), Franklin, North Carolina, and WYQS(FM), Mars Hill, North Carolina. In addition, WNCPR is the licensee of six FM translator stations serving nearby communities in the rural mountain region of western North Carolina and holds active construction permits for three new FM translator stations in the area.

The Commission also seeks comment on whether it should amend its rules to permit the assignment of LPFM authorizations from the licensee to another entity and whether it should allow monetary consideration for these transactions (*i.e.*, should the Commission permit the sale of LPFM stations). WNCPR's position on this is an emphatic NO! The fact that the Commission currently allows the sale of NCE FM stations and translators licensed as noncommercial translators, whether on reserved or nonreserved channels, is already a policy mistake that enables abuse of the Commission's original intent when it reserved NCE channels to be operated as a non-profit public service. The ability to freely sell NCE facilities has opened the door for sham organizations to constitute themselves as non-profit public service or religious entities to acquire a NCE license with the intent not to provide public service but to broker time on NCE stations and personally enrich the license holder, or to traffic in these licenses and sell them to the highest bidder.

Current Commission practice is to routinely approve these transfers of licenses, but often the transfer is accompanied by a payment from the buyer to the seller that can run into hundreds of thousands -- and recently millions -- of dollars. It is obvious that these transactions result in a significant financial gain to the seller -- for an asset that they acquired simply by applying to the Commission some time in the past. These closed, two-party transfers also eliminate the opportunity for other qualified entities to apply for these licenses. A fairer way to accommodate LPFM license transfers, eliminate the abuse of license trafficking, and maintain assurance that LPFM stations will deliver the best public service would be for licensees to return any unused or unneeded licenses or construction permits to the Commission, where they can then be competitively applied for in the Commission's next filing window by all local entities that want to provide public service on local LPFM stations.

B. Ownership and Eligibility Limitations

WNCPR agrees with the UCC request that the Commission should permanently prohibit multiple ownership and either permanently restrict LPFM eligibility to local entities or extend the restriction for an additional period of time. This policy would continue to foster diversity and maximize the opportunities for multiple applicants to obtain LPFM authorizations. If the Commission allows common ownership of multiple LPFM stations, a community would be forever deprived of the diversity that additional local entities could provide in the future. Common ownership could make the fullest use of the LPFM spectrum, but at the cost of restricting the diversity of voices and programming that would be on the air. The technical concern about filling all available spectrum as soon as possible should not override the programmatic imperative of making room for additional program diversity -- which, after all, is the driving force behind the creation of LPFM. The Commission should not negate this philosophy for technical expediency. Allowing common ownership would eliminate the ability of a community to have additional voices come on the air in the future.

Case in point: WNCPR's main community of license (Asheville, NC) has two LPFM stations on the air run by private non-profit organizations. We also have two colleges with an interest in acquiring LPFM licenses. If the existing LPFM license holders were permitted to acquire additional LPFM licenses, and later these colleges wanted to apply for LPFM licenses, the colleges might be forever precluded from this option if the only remaining LPFM frequencies were already awarded to the early-on license holders of the original two LPFM authorizations. The result: spectrum is fully utilized, but diversity of voices and programming is forever limited.

The Commission has also considered allowing national NCE entities interested in local

outlets to increase their reach to apply for LPFM licenses in local communities. This too goes against the principle of localism that LPFM was created to support, and WNCPR strongly encourages the Commission not to permit entities that exist or are controlled by organizations outside of a local community to be eligible for LPFM licenses. Again, do not allow the interest in immediate full spectrum use to override the principle of localism and the opportunity for the future diversity of local voices.

For these reasons, the Commission should make permanent its restrictions regarding local entities and multiple ownership. This would indeed foster diversity of programming and viewpoints on the air. This eligibility restriction for local entities will certainly ensure local service for listeners -- if not immediately, over time. It will not result in some communities losing LPFM service; just consider the current lack of full power FM allocations and the numbers of entities that would apply for these authorizations if they became available. If frequencies are available, they will be used!

II. Technical Rules

A. Interference Protection Requirements

As stated above, WNCPR operates six FM translator stations and has active construction permits for three more. Because of the low power authorization of our main transmitter (WCQS in Asheville) and its inability to cover all of western North Carolina, WNCPR must employ translator stations to get its signal over and around the mountains of western North Carolina and onto the ground where the populations reside. These FM translators are not satellite-fed. They are fed terrestrially - two by microwave and four by off-air repeaters of WCQS or WFQS (and the three CP sites will be fed off-air as well). While technically these FM translators are "secondary" services, they provide the only public radio service for many listeners in our region.

The nine signal contour maps that accompany these Comments show the coverage areas for our FM translator stations, with the “white area” designating where these translators provide the only NCE service to their assigned communities and environs. Given the irregular terrain in western North Carolina, service from noncommercial stations does not actually achieve the coverage percentage which would be expected if only the standard contours were used. As to WNCPR’s translators, in each case a portion of the service area is unserved by any full service noncommercial radio station when propagation is evaluated using the Longley-Rice propagation model.

When looking at our signal contour maps, *light red shading* shows the area predicted to receive at least 60 dBu signal strength from any full service licensed noncommercial FM station in North Carolina, South Carolina, Tennessee or Georgia, based on the Longley-Rice v1.2.2 propagation model and a receive antenna 30 feet (9.1 meters) above ground. *Dark brown contour lines* show the 60 dBu F(50,50) contour calculated using the FCC method with 3 arc second terrain extracted at one degree increments. *Blue contours* show the first point (closest to the translator) where the signal level drops to 60 dBu. All points within the blue contour are predicted to receive at least a 60 dBu signal based on the Longley-Rice propagation model. And *red contours* show the last point where the signal is at least 60 dBu based on the Longley-Rice propagation model.

Western North Carolina defines itself as a separate region -- geographically, culturally and economically. WNCPR has committed WCQS to serve this region. The station’s programming reflects local activities that take place in all 12 of the westernmost counties of North Carolina. WCQS is a local service in all of the communities served by our FM translators. Our programming covers news in these communities; we air public service announcements about activities that take place in these communities; and we produce programming from the cultural events that take place in

these communities. The Commission must recognize in this deliberation that FM translator stations can (and do in our case) provide local service to their communities. The Commission must not relegate these existing translators to a service secondary to newly-licensed LPFM stations and subject them to having to protect LPFM signals.

B. Continued Co-Equal Status for LPFM and Terrestrially-Fed Translator Services

FM translators and LPFM stations currently are considered co-equal facilities. Most of our translators are 10 watts - the same as LP10 stations -- and one of our translators (W237AR) is authorized at 125 watts - more than a LP100 station. From the standpoint of power, these facts demonstrate that our translators provide equal or greater coverage and technical service than would LPFM stations in these same communities. WNCPR urges the Commission to maintain this definition of co-equal services and prioritize the awarding of licenses to first-in applicants based on application filing date -- regardless of whether the application is for translator or LPFM service.

WNCPR's translators are local signals that repeat a local Western North Carolina station. They also provide local public radio service to the communities that they serve. They are not satellite-fed repeaters of distant signals. 159,321 (FCC coverage population count) residents of western North Carolina receive their local public radio service from WCQS translators -- some for the last eight years (W269AY in Highlands, NC); others for as long as 18 years (W209AE in Cullowhee, NC). We strongly oppose the position of Prometheus that LPFM stations categorically should be given priority over FM translators -- especially terrestrially-fed translators, like WNCPR's, that fulfill the Commission's intended purpose that translator service should extend the reach of local full power FM stations.

The Commission may want to consider giving LPFM applicants primary status over "other

area” satellite-fed translator applicants. There may be a case to be made that a LPFM station will provide a local service that a satellite-fed translator is incapable of providing. But the Commission should grant equal status to LPFM and terrestrially-fed translator applicants that can both provide local service. When both applicants can be considered as local in this respect, the Commission should not adopt any new licensing rule changes based on the class of service to resolve competing demands for spectrum. Rather, the Commission should use its current full-power procedures to select between mutually exclusive LPFM and FM translator applications.

The Commission should also provide “grandfathered” protection rights to terrestrially-fed FM translators that are currently licensed and operating, or for which construction permits have been granted. Licensees have invested significant time, finances and community goodwill to get these stations on the air. This proceeding should not negate or cancel out this investment that has only been encouraged and made possible by Commission rules, policies and actions in the past. For these same reasons, the Commission should not dismiss all pending applications for new FM translator stations and make potential refilings subject to the resolution of the licensing issues raised in this proceeding. These pending applications were also the result of local investments of time, money and community goodwill -- again because of Commission rules and action. Likewise, the Commission should not dismiss pending mutually exclusive FM translator applications -- especially those for which the MX parties do not include any LPFM applicants.

Finally, the Commission must recognize that many public radio FM translator stations have been funded by grants from the Public Telecommunications Facilities Program. It would be unsound national policy for one Federal agency (the FCC) to create and implement rules that would negate

(and waste) a financial investment by another Federal agency (the NTIA/PTFP).²

III. Conclusion

In sum, WNCPR asks the Commission to adopt the following positions that WNCPR has set forth above:

(1) The Commission SHOULD NOT construe a change in a non-profit organization's board of directors as a transfer of license or an ownership change -- regardless of the size of the turnover -- as long as the organization maintains its stated mission;

(2) The Commission SHOULD NOT allow the sale (transfer of license for monetary consideration) of LPFM licenses;

(3) The Commission SHOULD permanently prohibit multiple ownership of LPFM licenses in a community;

(4) The Commission SHOULD permanently restrict LPFM license eligibility to local entities; and

(5) The Commission SHOULD NOT give LPFM services priority over FM translator service; rather, it should continue to consider these as co-equal services.

WNCPR thanks the Commission for considering these comments on these issues.

² The following WCQS / WFQS translators have been funded, in part, by PTFP grants. The funds that matched these PTFP grants were provided by members of the communities that these translators serve: W209AD, Clyde, NC; W218AB, Sylva, NC; W209AE, Cullowhee, NC; and W237AR, Hazelwood, NC. WNCPR also has a construction permit for W234AS, Bryson City, NC, and a current PTFP application to partially fund the construction of this translator. W234AS covers "white area" unserved by any other NCE radio station. Since the highest PTFP priority is to bring first public radio service to an area, WNCPR fully expects to be granted PTFP funding for this translator by October 1, 2005. In addition, the following WCQS/WFQS translators were funded with local community funds provided by members of the communities served by these translators: W269AY, Highlands, NC; and W218AD, Brevard, NC.

Respectfully submitted

WESTERN NORTH CAROLINA PUBLIC
RADIO, INC.

By: Edward Subkis
Edward Subkis
Assistant Secretary of
Western North Carolina Public Radio, Inc. and
General Manager of Station WCQS(FM)

and

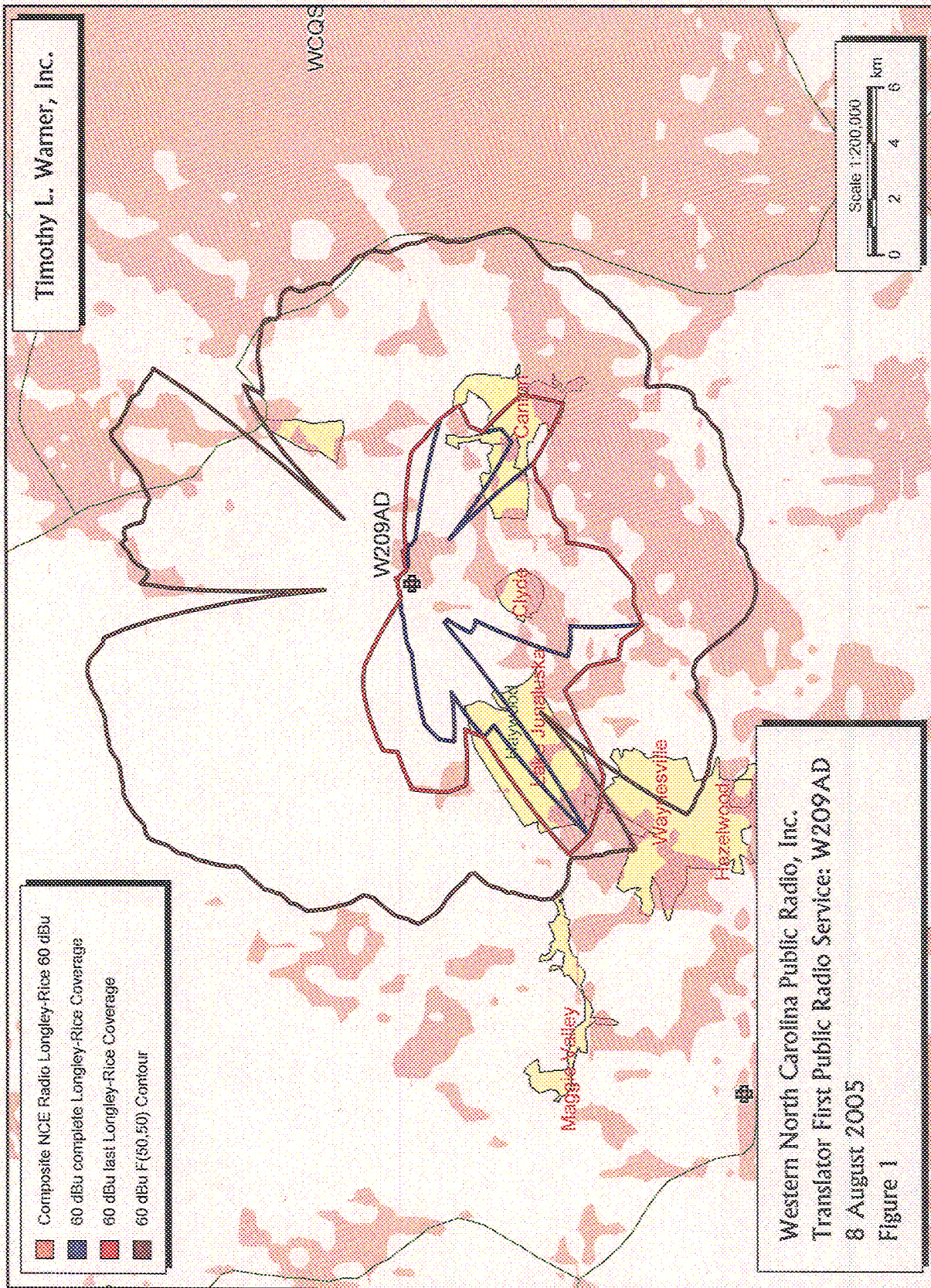
By: Jerold L. Jacobs
Jerold L. Jacobs

Cohn and Marks LLP
1920 N Street, N.W. Suite 300
Washington, D.C. 20036-1622
Tel. 202-293-3860

Its Counsel

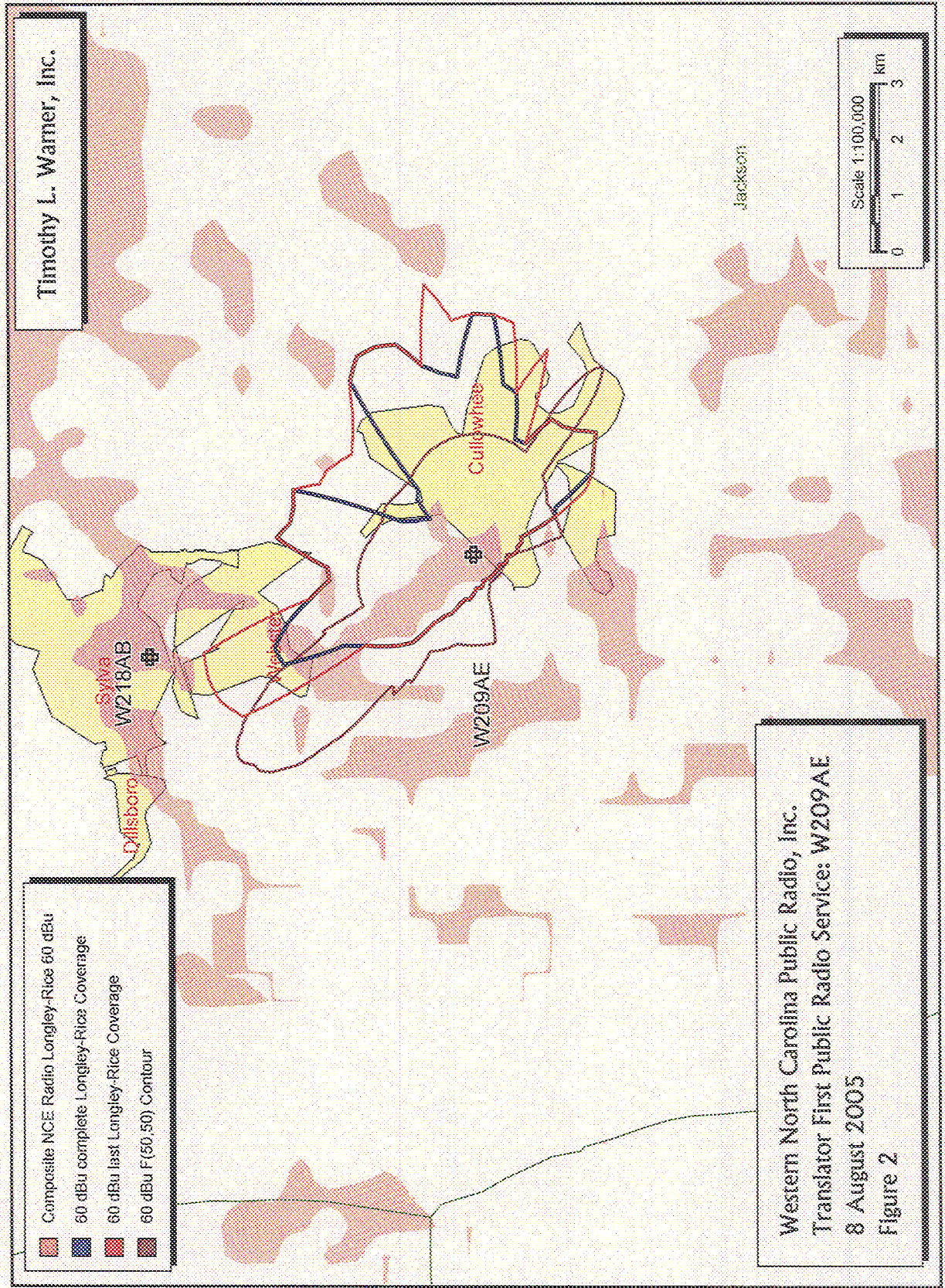
Dated: August 22, 2005

Attachment: Nine Service Contour Maps

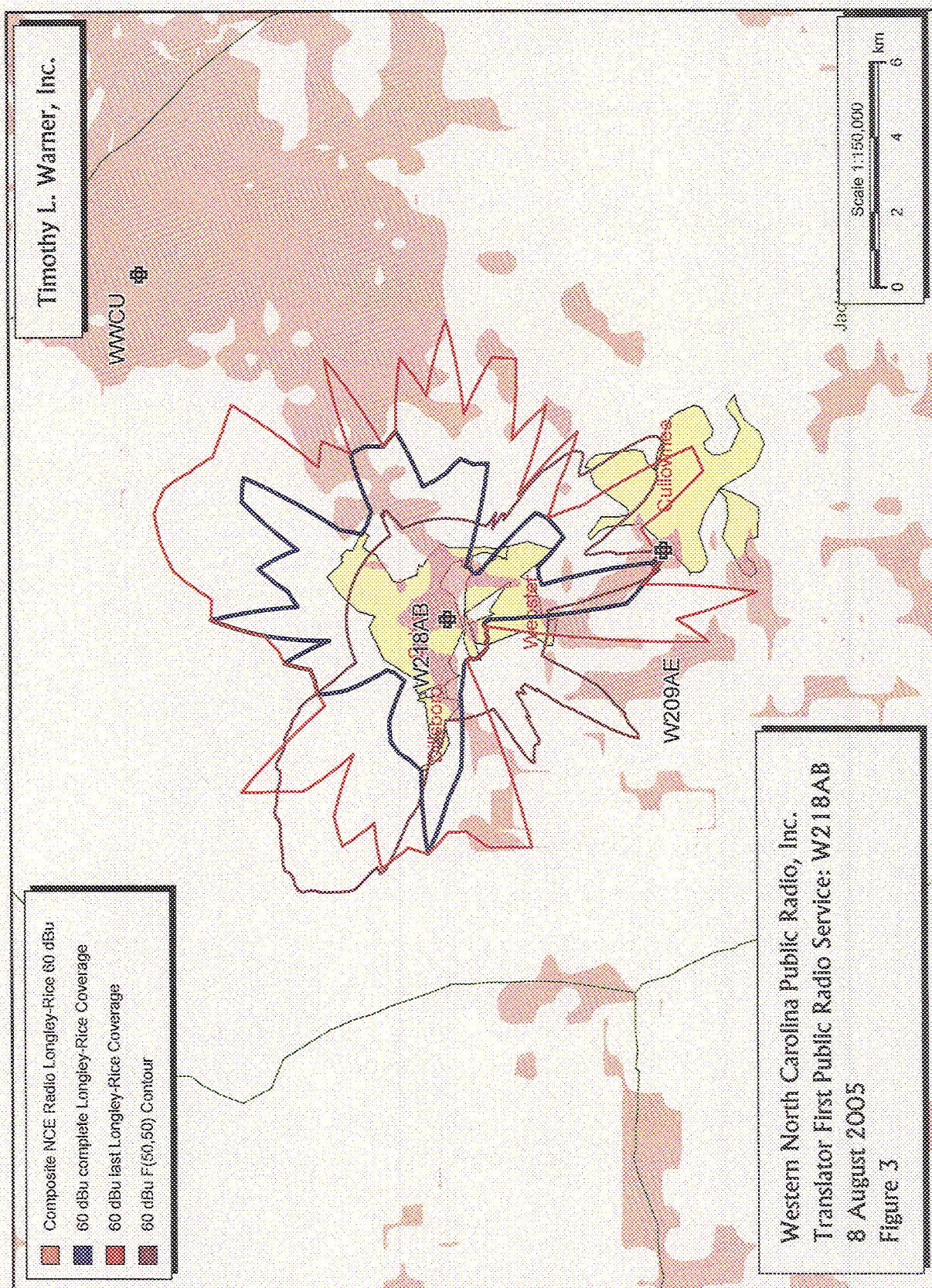


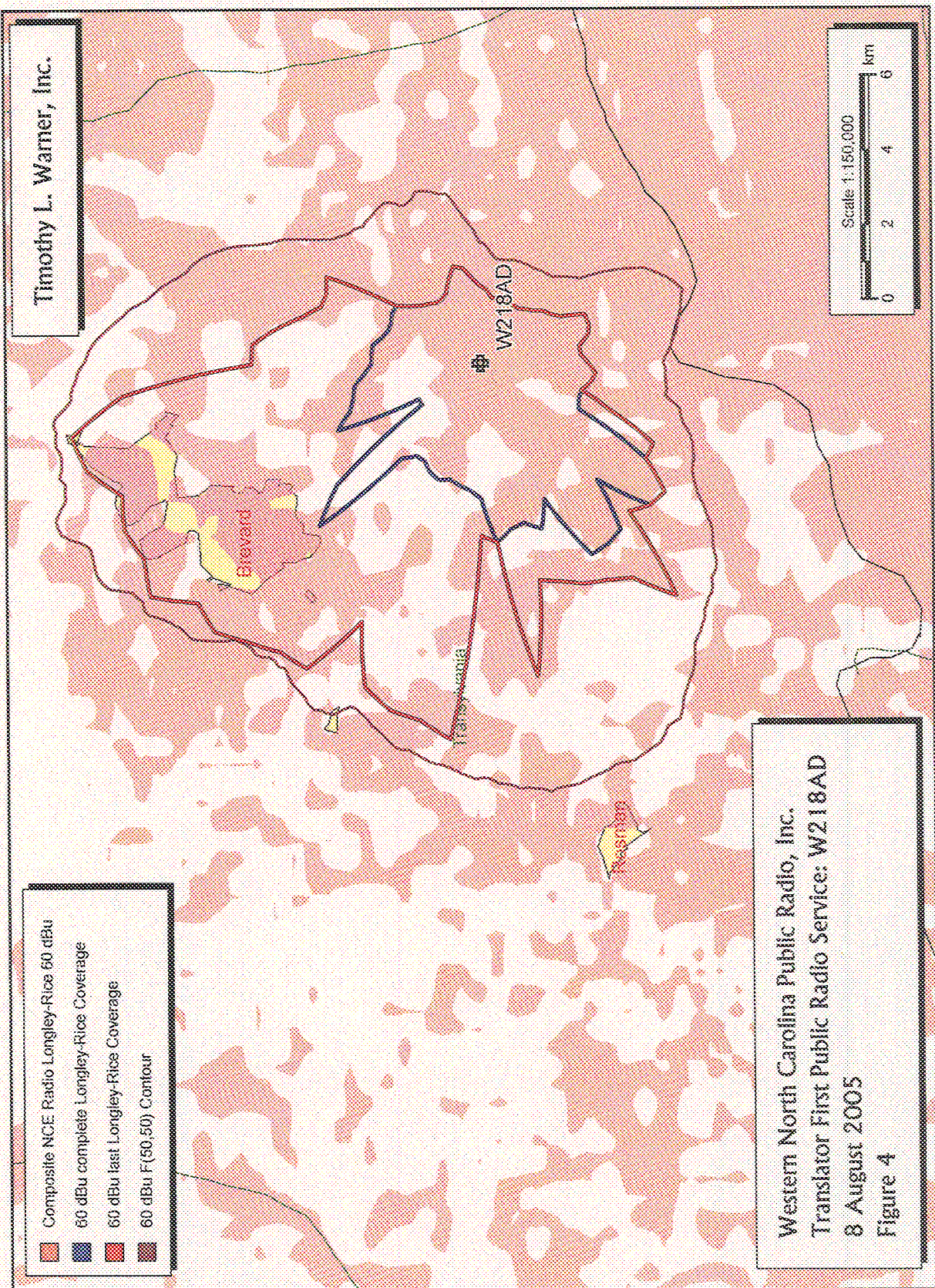
Timothy L. Warner, Inc.

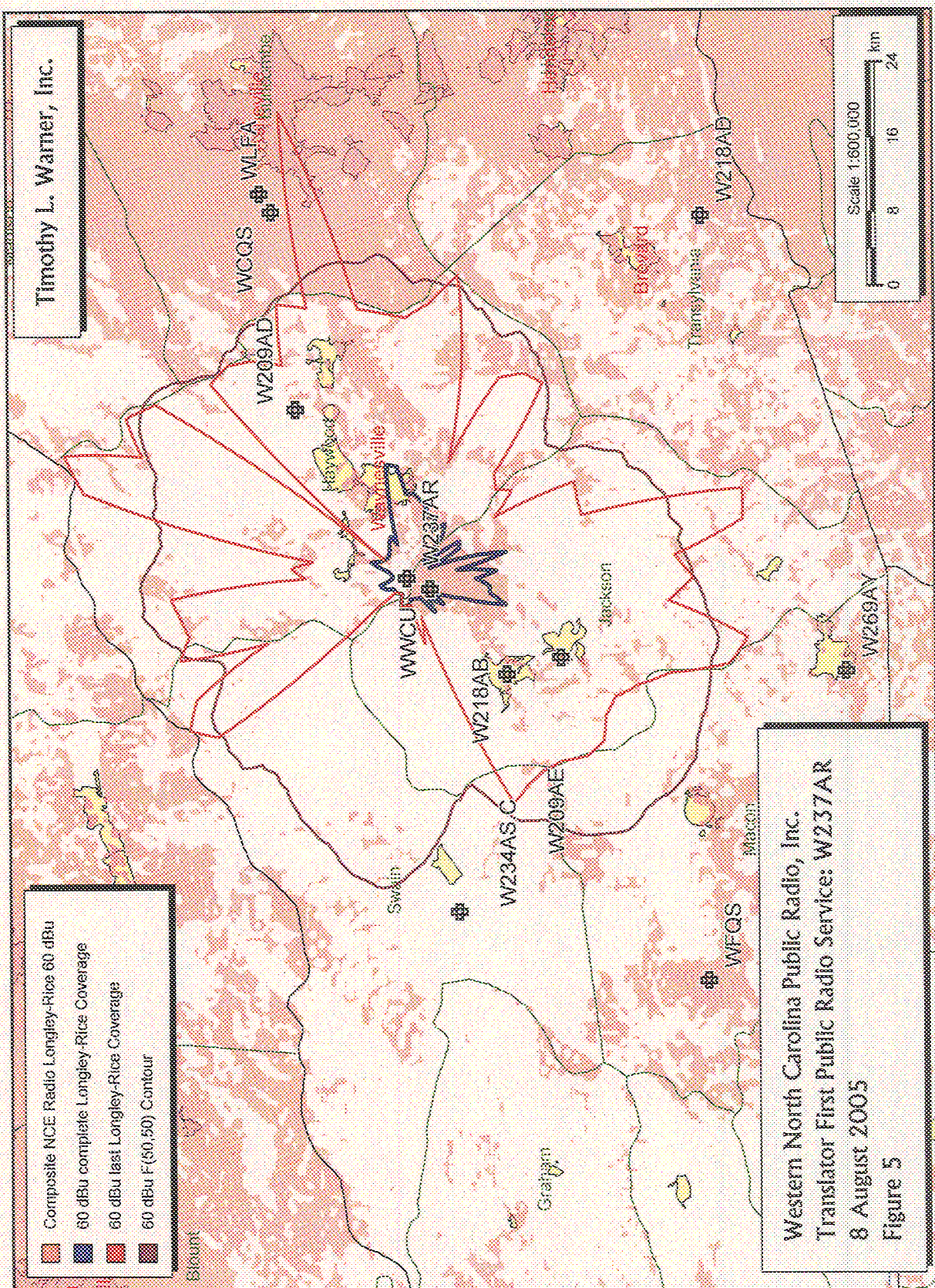
- Composite NCE Radio Longley-Rice 60 dBu
- 60 dBu complete Longley-Rice Coverage
- 60 dBu last Longley-Rice Coverage
- 60 dBu F(50,50) Contour

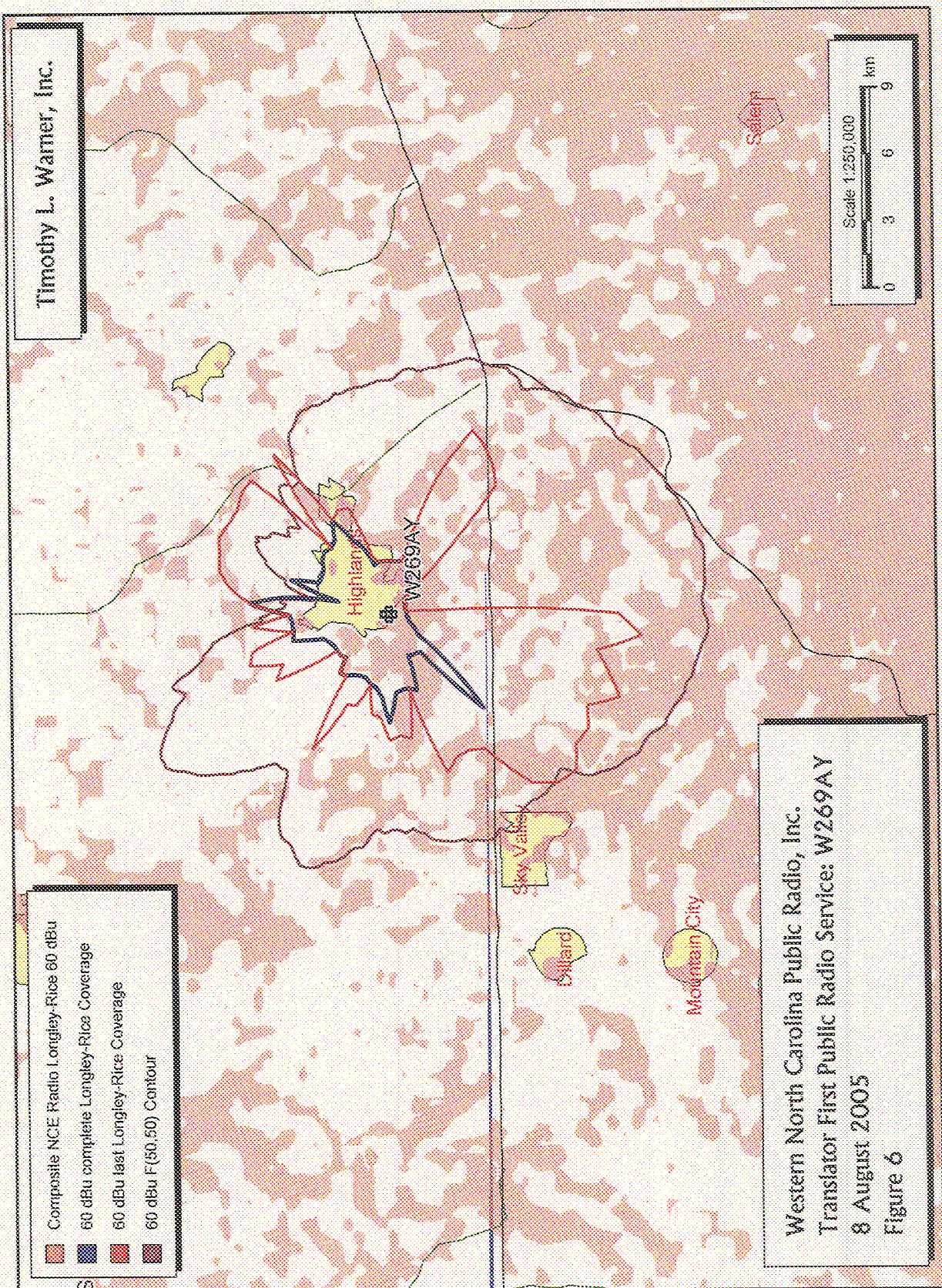


Western North Carolina Public Radio, Inc.
Translator First Public Radio Service: W209AE
8 August 2005
Figure 2



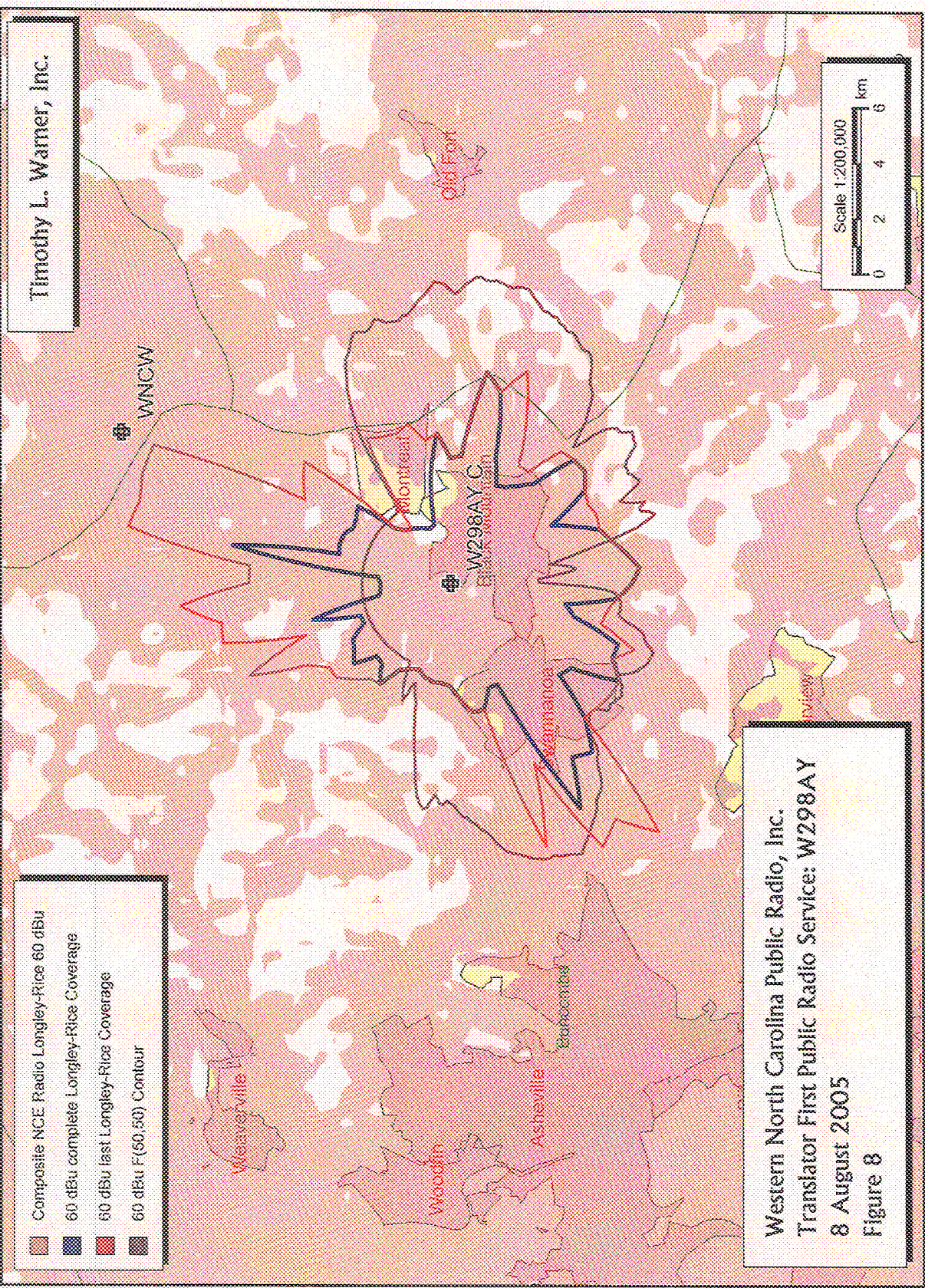






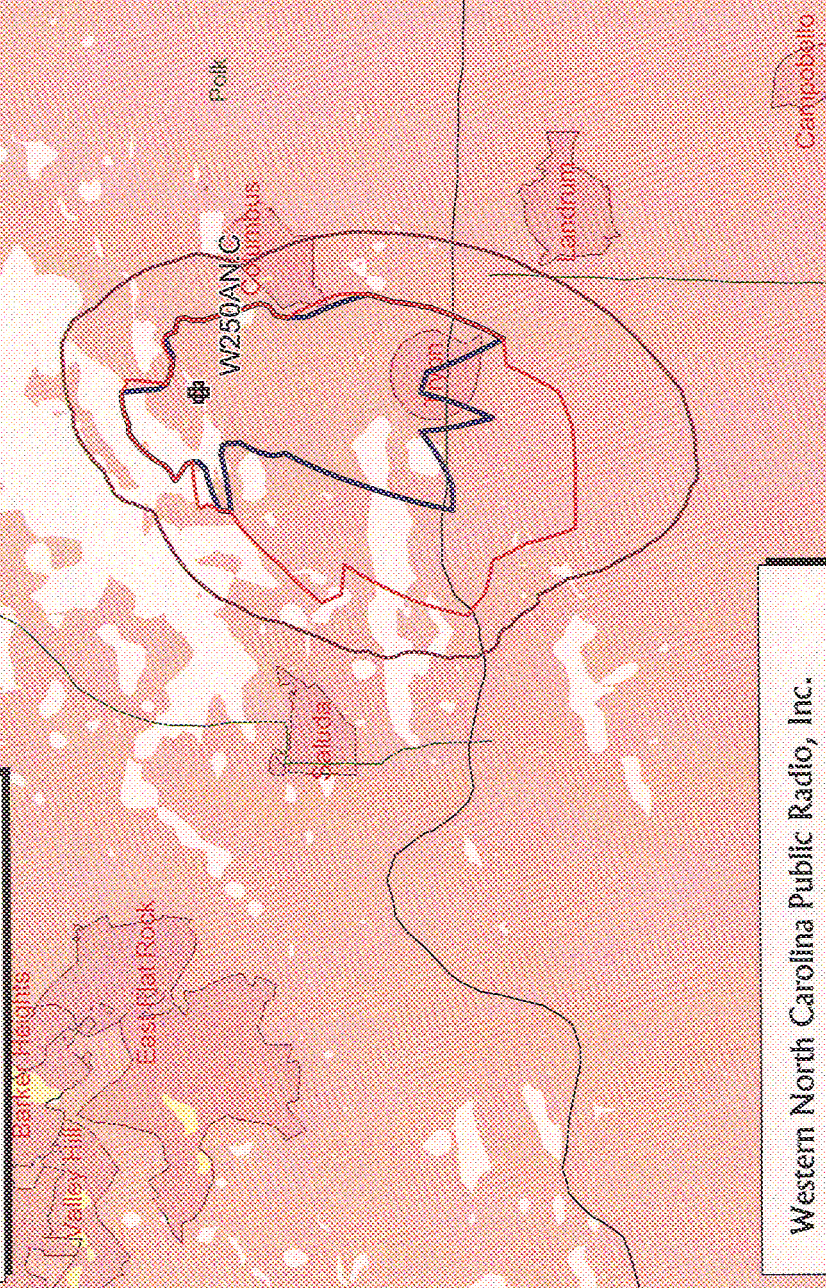






Timothy L. Warner, Inc.

- Composite NCE Radio Longley-Rice 60 dBu
- 60 dBu complete Longley-Rice Coverage
- 60 dBu last Longley-Rice Coverage
- 60 dBu F(50,50) Contour



Scale 1:200,000
0 2 4 6 km

Western North Carolina Public Radio, Inc.
Translator First Public Radio Service: W250AN
8 August 2005
Figure 9